

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

Pending before the Court is the Motion to Dismiss Plaintiff's Third Amended Complaint, (ECF No. 85), filed by Defendants City of Henderson ("Henderson") and Detective Perdue (collectively, "Henderson Defendants"). Plaintiff Harvester Harris ("Plaintiff") filed a Response, (ECF No. 86), and Henderson Defendants filed a Reply, (ECF No. 87). For the following reasons, the Motion to Dismiss is **GRANTED**.

I. BACKGROUND

This case arises out of a traffic stop involving Plaintiff and Defendants Officer Scott Nielson (“Officer Nielson”) and Detective Perdue (collectively “Officers”). Specifically, Plaintiff was working as a cab driver on March 8, 2013, when he was stopped by an unmarked vehicle driven by Officer Nielson and Detective Perdue. (See Third Am. Compl. (“TAC”) ¶ 22, ECF No. 82). Plaintiff alleges that the Officers seized him as both “were on duty and in plain

1 clothes (jeans and dark tops) void of any police identification marking.” (*Id.* ¶ 18). Plaintiff
2 alleges that Officer Nielson then “took out his handcuffs, pulled and simultaneously twisted
3 [Plaintiff’s] right middle finger, and put him in handcuffs.” (*Id.* ¶ 26). Plaintiff alleges he was
4 seized for “16 minutes, 8 seconds.” (*Id.* ¶ 95). Additionally, no traffic citation was issued. (*Id.*
5 ¶ 85). Plaintiff alleges that “[a]s a result of Defendants’ use of force, and choice not to prevent
6 the use of excessive force, Plaintiff has suffered permanent injuries to his right middle finger.”
7 (*Id.* ¶ 35). Furthermore, Plaintiff asserts he was unreasonably seized by Officer Nielson and
8 Detective Perdue. (*Id.* ¶¶ 36).

9 Following this incident, Plaintiff made Freedom of Information Act (“FOIA”) requests
10 to Henderson Defendants, “however each department chose not to comply.” (*Id.* ¶ 37).
11 Additionally, there is no evidence as to whether the Henderson Police Department conducted
12 an investigation into Detective Perdue. (*Id.* ¶ 107).

13 Plaintiff filed the instant action on February 25, 2015. (*See* Compl., ECF No. 1). On
14 July 31, 2015, the parties filed a Stipulation to Amend Complaint (ECF No. 25), and on August
15 10, 2015, Plaintiff filed his First Amended Complaint (“FAC”) (ECF No. 28). On June 20,
16 2016, Plaintiff’s FAC was dismissed without prejudice and Plaintiff was granted leave to file a
17 second amended complaint, which was filed on July 5, 2016. (Dismissal Order, ECF No. 50);
18 (Sec. Am. Compl., ECF No. 53).

19 On January 27, 2017, the Court granted Motions to Dismiss that terminated Defendants
20 Doug Gillespie and Chief Patrick Moers, (*see* Order, ECF No. 78). The Order also granted
21 Plaintiff leave to amend and file a third amended complaint “to cure the jurisdictional
22 deficiencies identified in this Order for [Plaintiff’s] fourth, fifth, and sixth causes of action
23 regarding his state law claims against Detective Perdue.” (Order 10:8–9).

24 Plaintiff filed his Third Amended Complaint (“TAC”) on February 17, 2017. (TAC,
25 ECF No. 82). The TAC alleges the following causes of action: (1) 42 U.S.C. § 1983 violations

1 against Defendant Officer Nielson; (2) *Monell* claims against Defendant Las Vegas
2 Metropolitan Police Department (“LVMPD”); (4) false arrest and false imprisonment against
3 Henderson, Officer Perdue, and Officer Nielson; (5) intentional infliction of emotional distress
4 against Henderson, Officer Perdue, and Officer Nielson; and (6) negligence against Henderson,
5 Officer Perdue, and Officer Nielson (TAC ¶¶ 108–62).

6 **II. LEGAL STANDARD**

7 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon
8 which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
9 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on
10 which it rests, and although a court must take all factual allegations as true, legal conclusions
11 couched as a factual allegation are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule
12 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements
13 of a cause of action will not do.” *Id.*

14 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
15 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556
16 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). “A claim has facial plausibility
17 when the plaintiff pleads factual content that allows the court to draw the reasonable inference
18 that the defendant is liable for the misconduct alleged.” *Id.* This standard “asks for more than a
19 sheer possibility that a defendant has acted unlawfully.” *Id.*

20 “Generally, a district court may not consider any material beyond the pleadings in ruling
21 on a Rule 12(b)(6) motion.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542,
22 1555 n.19 (9th Cir. 1990). “However, material which is properly submitted as part of the
23 complaint may be considered.” *Id.* Similarly, “documents whose contents are alleged in a
24 complaint and whose authenticity no party questions, but which are not physically attached to
25 the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss” without
converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14

1 F.3d 449, 454 (9th Cir. 1994). On a motion to dismiss, a court may also take judicial notice of
2 “matters of public record.” *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986).
3 Otherwise, if a court considers materials outside of the pleadings, the motion to dismiss is
4 converted into a motion for summary judgment. Fed. R. Civ. P. 12(d).

5 If the court grants a motion to dismiss for failure to state a claim, leave to amend should
6 be granted unless it is clear that the deficiencies of the complaint cannot be cured by
7 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant
8 to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in
9 the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the
10 movant, repeated failure to cure deficiencies by amendments previously allowed, undue
11 prejudice to the opposing party by virtue of allowance of the amendment, futility of the
12 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

13 **III. DISCUSSION**

14 In the instant Motion, Henderson Defendants argue that Plaintiff’s claims should be
15 dismissed because Plaintiff’s claims against Henderson “were all previously dismissed and
16 Plaintiff was not granted leave to amend, to add, or renew any claims against the city.” (Mot. to
17 Dismiss 5:4– 6, ECF No. 85). Additionally, Henderson Defendants argue that “Plaintiff’s TAC
18 has failed to address, much less cure the jurisdictional deficiencies identified in the Order
19 granting dismissal of all of Plaintiff’s claims against the Henderson Defendants.” (*Id.* 6:12–14).
20 The Court will address each in turn.

21 **A. Claims Against Henderson**

22 Plaintiff alleges that the only claims remaining against Henderson are the fourth, fifth,
23 and sixth causes of action alleging state law violations. However, the Court previously in its
24 Order stated that “Defendant does not oppose dismissal of these claims” and held that “the
25 Court grants dismissal of the state law claims against Henderson with prejudice.” (Order 8:25

1 n.2, ECF No. 78). Moreover, the Court did not provide Plaintiff leave to amend these claims as
2 they were dismissed with prejudice. Accordingly, the Plaintiff's fourth, fifth, and sixth causes
3 of action against Henderson are stricken and remain dismissed with prejudice.

4 **B. Claims Against Detective Perdue**

5 As in the SAC, Plaintiff asserts three state tort claims against Detective Perdue: (1) false
6 arrest and imprisonment; (2) intentional infliction of emotional distress ("IIED"); and (3)
7 negligence. (TAC ¶¶ 132–62). The Court granted Plaintiff leave to amend these claims to
8 potentially cure the jurisdictional deficiencies, but Plaintiff failed to do so. Because Plaintiff
9 has failed to rectify these jurisdictional issues in only having pendant jurisdiction, the Court
10 declines to exercise supplemental jurisdiction over Plaintiff's state law claims, and Plaintiff's
11 state law claims against Perdue are dismissed for lack of subject matter jurisdiction. The Court
12 previously granted Plaintiff leave to amend these claims for a chance to rectify the federal
13 jurisdictional issues, (*see Order 10:7–9*, ECF No. 78). However, because Plaintiff was unable
14 to do so in his TAC, the Court will not again provide leave to amend the claims against
15 Detective Perdue, but the claims are dismissed without prejudice for potential opportunity to
16 file in state court.

17 **C. Leave to Amend**

18 The Federal Rules of Civil Procedure Rule 15(a)(2) allows courts to "freely give leave
19 [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). However, courts may dismiss
20 the complaint without leave to amend when a plaintiff's amendments "would fail to cure the
21 pleading deficiencies and amendment would be futile." *Cervantes v. Countrywide Home Loans,*
22 *Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011).

23 Here, after allowing Plaintiff to amend his Complaint three times, Plaintiff has
24 consistently failed to allege the necessary facts to support his claims against Henderson
25 Defendants. Because Plaintiff continuously fails to cure the pleading deficiencies, the Court
finds that granting Plaintiff leave to amend for a fourth time on the majority of his claims

1 would be futile. Accordingly, the Court dismisses all claims against Detective Perdue with
2 prejudice.

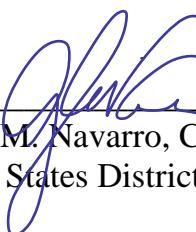
3 **IV. CONCLUSION**

4 **IT IS HEREBY ORDERED** that the Motion to Dismiss, (ECF No. 85), is **GRANTED**.
5 Specifically, the Court dismisses all claims against Detective Perdue.

6 **IT IS FURTHER ORDERED** that Plaintiff's fourth, fifth, and sixth causes of action
7 alleged against Henderson are stricken and remain dismissed with prejudice pursuant to the
8 Court's prior Order, (ECF No. 78). Accordingly, Henderson and Perdue are terminated from
9 the case and only Defendants LVMPD and Officer Nielson remain.

10 **IT IS FURTHER ORDERED** that Plaintiff, LVMPD, and Officer Nielson must file
11 their Joint Pretrial Order by December 4, 2017.

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13 **DATED** this 10 day of October, 2017.

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Gloria M. Navarro, Chief Judge
United States District Judge